

The claimant requests review of this decision alleging that she not only injured her left lower extremity, but her right lower extremity and lower back as a result of her altered gait. She argues the ALJ should have awarded her an 8 percent whole body functional impairment rating along with a 78.5 percent permanent partial general disability (based upon a 57 percent task loss and a 100 percent wage loss). Claimant also argues that the ALJ erred by subtracting the temporary total disability (TTD) benefits before calculating the number of weeks for permanency. Moreover, in the event that the functional impairment assessed by the ALJ is affirmed, claimant maintains the ALJ erred in his ultimate calculation of the Award by using the wrong scheduled number of weeks for purposes of determining the ultimate percentage of permanency. Thus, the Award must be modified to correct this mathematical error.

Respondent contends the claimant failed to prove that she is entitled to an award beyond the functional impairment and for that reason, the ALJ's Award should be affirmed in that respect. However, respondent urges the Board to consider modifying claimant's impairment calculation to reflect a permanent impairment the level of the left foot rather than the left lower extremity (leg).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The compensability of claimant's underlying accident is not at issue. On October 5, 2005, claimant suffered injury to her left foot when a large rolling container of meat tipped over onto her foot. After seeing the company physician and a period of conservative treatment which included medications, physical therapy, injections and limited work restrictions, claimant's condition plateaued and then deteriorated. She sought further treatment and was referred to Dr. Stanley Bowling.

Dr. Bowling first saw claimant on June 6, 2006. At this examination claimant was complaining of burning and stinging in her left foot. Dr. Bowling ordered an EMG which confirmed tarsal tunnel syndrome or impingement. That diagnosis led him to recommend and ultimately perform an open tarsal tunnel release in October 2006. A tarsal tunnel release is a procedure that involves an incision that begins at the ankle and continues down towards the foot. After surgery, claimant continued to have pain and her recovery was admittedly slow. By April 20, 2007, she was at maximum medical improvement and Dr. Bowling rated her with a 10 percent to the left lower extremity.² When asked if this was

² American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.). All references are to the 4th ed. of the *Guides* unless otherwise noted.

at the foot or ankle level, he explained that to him, it was both the “foot and ankle.”³ And while the situs of the injury was at her foot, the surgery involved both the ankle and foot.⁴

When questioned about the contents of his file, Dr. Bowling admitted that claimant first complained of low back pain on September 15, 2006.⁵ He also agreed that an altered gait is sometimes part of the tarsal tunnel condition due to the pain involved in walking.⁶ Finally, he conceded that he had only been hired to evaluate and treat claimant’s foot and ankle complaints, not her back.⁷

Claimant was also evaluated by Dr. Sergio Delgado at her lawyer’s request on two separate occasions. The first exam occurred on June 15, 2006. Claimant described her accident and related contemporaneous complaints of pain in her foot which led to pain in both her knees and calves and her low back. Like Dr. Bowling, Dr. Delgado recommended an EMG to help diagnose her condition.

By the time of Dr. Delgado’s second examination in September 2007, claimant was nearly a year post-surgery. While she had improved following the surgery, she continued to have a limp and experienced pain in her ankle and low back. Dr. Delgado again examined claimant and found localized discomfort in both sacroiliac joints. He did not observe any guarding or spasms, but nonetheless went ahead and diagnosed sacroiliac derangement secondary to prolonged gait abnormality caused by her left foot and ankle injury.

Dr. Delgado assigned the following impairments as a result of claimant’s work related accident: 10 percent to the left lower extremity for the tarsal tunnel condition, and additional 2 percent impairment to the right lower extremity based on claimant’s myofascial complaints. He added another 3 percent to the whole body for claimant’s sacroiliac derangement for a total of an 8 percent whole impairment. He restricted claimant to avoiding prolonged standing, sitting, climbing, running and squatting. In the event claimant did these activities she is to avoid doing them on a consecutive basis for more than 2 hours, resting 1 hour in between.

With respect to the right lower extremity and low back complaints, Dr. Delgado explained that those complaints and resulting conditions were wholly attributable to

³ Bowling Depo at 12.

⁴ *Id* at 12-13.

⁵ *Id* at 15.

⁶ *Id* at 19.

⁷ *Id*.

claimant's accident. He explained that because claimant's left foot and ankle complaints were not addressed in a timely fashion, she developed an altered gait and that led to additional strain on her right ankle and ultimately irritated her sacroiliac joint. There is no indication in his testimony as to which of the restrictions he assigned are related to the ankle versus the back injury.

When the parties could not agree on a functional impairment, the ALJ appointed Dr. Peter Bieri to conduct an independent medical examination and render an opinion as to the nature and extent of claimant's impairment. Following his examination, which included claimant's complaints not only to her left foot and ankle but to her right foot and her low back, he issued a report that assigned a 10 percent impairment solely to the left lower extremity. According to Dr. Bieri there was an "insufficient basis for finding a permanent impairment in claimant's back and right foot as a result of her subjective complaints. Dr. Bieri did, however, impose the following restrictions: no squatting, kneeling, crouching, or crawling, sustained ambulation and weight bearing should be limited to no more than 300 feet at a time on level surfaces with avoidance of climbing or descending ladders of more than three steps, sustained weight bearing activities should be limited to no more than 2 hours at a time with 30 minutes for postural adjustments. He did not indicate whether any of these restrictions were related to the low back complaints or solely to the lower extremity injury.

Respondent accommodated the claimant's temporary restrictions up until September 14, 2006 when she was taken off of work and provided with TTD benefits. On October 31, 2006, claimant had surgery, and when she recovered she sought out alternative and more sedentary employment. In early May 2007, she found employment earning \$295 per week. This translates to a 43 percent wage loss. She continued at that job until March 14, 2008, when she relocated to Dodge City, Kansas to be with her fiancé. She has yet to obtain further employment in spite of her efforts and presently has a 100 percent wage loss.

The ALJ noted that the *Guides* defined "'permanent impairment' as one that has 'become static or stabilized during a period of time sufficient to allow optimal tissue repair, and one that is unlikely to change in spite of further medical or surgical therapy.'"⁸ And because the definition "excludes body parts which have not been evaluated for the need for medical treatment" he concluded that claimant's lack of treatment to her back precluded any award for permanency. Thus, he adopted the impairment findings offered by Drs. Delgado and Bieri who both found claimant to bear a 10 percent permanent impairment to the left lower extremity. This 10 percent was calculated after deducting the TTD benefits claimant was paid in recognition of the Board's earlier decisions.⁹

⁸ ALJ Award (June 10, 2008), at 2, citing Section 1, page 1 of the *Guides*. Emphasis supplied.

⁹ See e.g. *Titus v. USD 229*, No. 1,031,642, 2007 WL 4662016 (Kan. WCAB Dec. 17, 2007).

The primary issue in this appeal is whether claimant's impairment is limited to her left lower extremity, either as a scheduled foot or ankle (lower leg) injury, or a whole body impairment. The ALJ believed that claimant's lack of treatment to her back was determinative and limited her recovery to her left lower extremity.

The Board has considered the record as a whole, the parties' arguments and the ALJ's rationale and a majority of the Board concludes claimant's permanent impairment is not limited to her left lower extremity but includes the low back as well. This majority is not persuaded by the ALJ's explanation that any award for permanency requires treatment. Here, claimant's low back complaints were consistent and longstanding. As was explained by Drs. Delgado and Bowling, the treating physician, it is common for a lower extremity injury to lead to an altered gait. And specifically in this instance, the claimant was experiencing pain while walking and that pain compelled her to alter her gait, transferring a majority of her weight to her opposing extremity which in turn caused unusual stress on her sacroiliac. Even Dr. Bowling conceded he was retained to treat only her left foot and ankle injury, ignoring her other complaints. Ideally claimant should have been provided treatment but for whatever reason she was not. Under these facts and circumstances a majority of the Board finds that claimant's low back complaints are a direct and natural consequence of her October 5, 2005 accident. Thus, claimant bears a 10 percent permanent partial impairment to the left lower extremity at the level of the lower leg (ankle) and a 3 percent permanent partial impairment to the low back. When combined, this yields a 7 percent to the body as a whole. And the majority of the Board adopts the restrictions imposed by Dr. Delgado.

Because the majority has concluded that claimant has sustained an unscheduled injury to her low back, to have sustained permanent impairment to her back, she is entitled to benefits based upon an unscheduled impairment under K.S.A. 44-510e(a).

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation**

in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury. (Emphasis added.)¹⁰

But that statute must be read in light of *Foulk*¹¹ and *Copeland*.¹² In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e(a) (the predecessor to the above-quoted statute) by refusing an accommodated job that paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e(a) (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages rather than actual earnings when the worker failed to make a good faith effort to find appropriate employment after recovering from the work-related accident.¹³

If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages.¹⁴

Here, the parties stipulated to a 57 percent task loss. Based upon the uncontroverted evidence, claimant's actual wage loss is 43 percent from May 1, 2007 to March 14, 2008. That averages to a 50 percent work disability. After March 14, 2008, claimant voluntarily left her job and relocated to Dodge City, Kansas to be with her fiancé. Unfortunately she has yet to obtain employment although she testified that she is regularly seeking work. Although respondent has suggested claimant's election to relocate to Dodge City equates to a lack of good faith and justifies an imputation of her post-injury wages for purposes of the work disability analysis, under these facts the Board does not agree. There is no evidence in the record that claimant was attempting to manipulate the workers compensation system by moving to Dodge City. Accordingly, claimant's actual

¹⁰ K.S.A. 44-510e(a).

¹¹ *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

¹² *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

¹³ In *Graham v. Dokter Trucking Group*, 284 Kan. 547, 161 P.3d 695 (2007), the Supreme Court signaled a willingness to revisit those cases where the judiciary decided public policy required the court to depart from the plain language in the statute and impute a wage to those claimants who failed to demonstrate a lack of good faith effort at finding appropriate postinjury employment. However, the Board will continue to follow the *Foulk* and *Copeland* line of cases until an appellate court decides that K.S.A. 44-510e(a) does not require the fact finder to impute a wage based upon a claimant's wage earning ability whenever a claimant fails to prove he or she made a good faith effort to find appropriate employment postinjury.

¹⁴ *Id.* at 320.

wage loss will be used from March 14, 2008, which leaves her with a 78.5 percent permanent partial general disability under K.S.A. 44-510e(a).

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated June 10, 2008, is modified as follows:

The claimant is entitled to 49.57 weeks of permanent partial disability compensation at the rate of \$300.61 per week or \$14,901.24 for a 7 percent functional disability, followed by 31.14 weeks temporary total disability compensation beginning September 16, 2006¹⁵ at the rate of \$346.57 per week or \$10,792.19, followed by 45.57 weeks of permanent partial disability at the rate of \$346.57 per week or \$15,793.20 beginning May 1, 2007 for a 50 percent work disability¹⁶, followed by permanent partial disability compensation at the rate of \$346.57 per week not to exceed \$100,000 for a 78.50 percent work disability beginning March 14, 2008.

As of October 27, 2008 there would be due and owing to the claimant 49.57 weeks of permanent partial disability compensation at a rate of \$300.61 per week in the sum of \$14,901.24, plus 31.14 weeks of temporary total disability compensation at a rate of \$346.57 per week in the sum of \$10,792.19, plus 45.57 weeks of permanent partial disability at the rate of \$346.57 per week or \$15,793.20, plus 31.86 weeks of permanent partial disability at the rate of \$346.57 per week or \$11,041.72 for a total due and owing of \$52,528.35. Thereafter the remaining balance in the amount of \$47,471.65 shall be paid at the rate of \$346.57 per week until fully paid or until further order from the Director.

IT IS SO ORDERED.

Dated this _____ day of October 2008.

BOARD MEMBER

BOARD MEMBER

¹⁵ Claimant continued to work with restrictions up to this date at which point she was taken off work. Also at this time claimant's fringe benefits were terminated and the claimant's average weekly wage increased to \$519.83, thus claimant's benefit rate increased.

¹⁶ Claimant returned to work making less money.

CONCURRING AND DISSENTING OPINION

The undersigned agree with the majority's factual findings and its determination that claimant is entitled to a work disability. However, we disagree with the majority's conclusion that the claimant's percentage of functional impairment for her scheduled injury to her left lower extremity should be combined with her percentage of functional impairment for her general body injury to her back for a single permanent partial disability award based upon the total of all her impairments. We read *Casco* to require the scheduled injury to be compensated separately.

Scheduled injuries are the general rule and nonscheduled injuries are the exception. K.S.A. 44-510d calculates the award based on a schedule of disabilities. If an injury is on the schedule, the amount of compensation is to be in accordance with K.S.A. 44-510d.

...

K.S.A. 44-510e permanent partial disability is the exception to utilizing 44-510d in calculating a claimant's award. K.S.A. 44-510e applies only when the claimant's injury is not included on the schedule of injuries.¹

Because the lower extremity is contained within the schedule of K.S.A. 44-510d(a), claimant's disability to that extremity must be compensated according to the schedule at the 190 week level. The back, however, is not contained within the schedule and, therefore, must be compensated as a general body disability under K.S.A. 44-510e.

Both the lower extremity and low back injuries occurred as a direct result of a work-related accident. Nevertheless, claimant's lower extremity injury is contained within the schedule of injuries in K.S.A. 44-510d. Therefore, claimant's permanent disability resulting from his shoulder injury is compensable as a separate scheduled injury based upon his percentage of functional impairment for that injury alone. In addition, although claimant is entitled to a work disability for her general body disability to her back the impairment and restrictions resulting from the scheduled injury to her lower leg cannot be included or utilized in the determination of claimant's wage and task loss.

BOARD MEMBER

BOARD MEMBER

DISSENTING AND CONCURRING OPINION

The undersigned Board Member would affirm the ALJ's Award limiting claimant's permanent partial impairment to the left lower extremity although the calculation of that impairment should be modified to reflect the impairment occurring at the level of the foot.

This member does, however, concur with that portion of the Award that concludes that injuries that involve both a schedule and a non-scheduled injury are to be combined for purposes of determining the ultimate functional impairment and work disability under K.S.A. 44-510e(a).

BOARD MEMBER

c: Jeffrey K. Cooper, Attorney for Claimant
Gregory D. Worth, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge